U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0669

BARRY T. BROWN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: June 18, 2018
	)	
CP&O, LLC/P&O PORTS VIRGINIA, INCORPORATED	)	
	)	
and	)	
	)	
PORTS INSURANCE COMPANY, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Charlene A. Morring (Montagna Klein Camden L.L.P.), Norfolk, Virginia, for claimant.

Christopher R. Hedrick and Bradley D. Reeser (Mason, Mason, Walker & Hedrick P.C.), Newport News, Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Awarding Benefits (2016-LHC-01907) of Administrative Law Judge Alan L. Bergstrom rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in

accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The parties stipulated that claimant injured his right hand, elbow, and ulnar nerve on September 16, 2013, during the course of his employment for employer as a lasher/longshoreman. Employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), from September 17, 2013 to March 11, 2014, and from June 12, 2014 to December 1, 2015. On December 2, 2015, employer commenced paying compensation for a 20 percent permanent impairment of the right upper extremity. 33 U.S.C. §908(c)(1). Claimant has not returned to his usual employment since June 12, 2014. The parties disputed whether claimant also sustained an injury to his right shoulder on September 16, 2013, and the nature and extent of his work-related disability.

In his decision, the administrative law judge denied the claim for a work-related shoulder injury on the bases that claimant did not establish the working conditions element for invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), and did not establish a work-related injury based on a preponderance of the evidence as a whole. Decision and Order at 22-24. The administrative law judge found that claimant's right arm injuries reached maximum medical improvement on December 1, 2015. *Id*. at 24-26. He further determined that claimant is unable to return to work as a longshoreman, that employer established the availability of suitable alternate employment on January 1, 2016, and that claimant did not exercise due diligence in seeking alternate work. *Id*. at 28-33. The administrative law judge therefore awarded claimant permanent total disability benefits, 33 U.S.C. §908(a), from December 1, 2015 to December 31, 2015, permanent partial disability benefits for a 20 percent right arm impairment thereafter, and medical benefits. *Id*. at 33-36.

On appeal, claimant challenges the administrative law judge's finding that his right shoulder condition is not work related, that he reached maximum medical improvement on December 1, 2015, that employer established suitable alternate employment, and that he did not exercise due diligence in seeking alternate work. Employer responds, urging affirmance in all respects.

Claimant first asserts the administrative law judge failed to properly apply the Section 20(a) presumption with respect to the claimed shoulder injury. The administrative law judge summarized claimant's testimony that he has suffered shoulder pain since the 2013 work accident and that he promptly told his treating physician, Dr. Leibovic, of the pain, but the doctor told him it was due to his right arm injury. Decision and Order at 23; Tr. at 24-26, 34, 37. The administrative law judge found that claimant's medical records do not report right shoulder pain until March 26, 2015. CX 3. At that time, Dr. Leibovic diagnosed right shoulder impingement, and he opined on January 18, 2016, that it is unrelated to the work injury. *Id.* at 18. The administrative law judge found that claimant

has a right shoulder injury, but he gave "no weight" to claimant's testimony of constant shoulder pain since the work injury. Decision and Order at 23. The administrative law judge instead gave weight to Dr. Leibovic's opinion that the shoulder impingement is unrelated to the work injury. *Id*. at 23-24. The administrative law judge concluded that claimant failed to establish that working conditions or the September 2013 work injury could have caused his right shoulder impingement and that claimant failed to establish by a preponderance of the evidence that he sustained a work-related shoulder impingement injury. *Id*.

We need not address claimant's specific contention that the administrative law judge erred in failing to apply the Section 20(a) presumption to his shoulder injury. Assuming, arguendo, that Section 20(a) applies to presume the work-relatedness of claimant's shoulder injury, the burden of production shifts to the employer, who must produce substantial evidence that claimant's condition is not work-related. *See Metro Machine Corp. v. Director, OWCP [Stephenson]*, 846 F.3d 680, 50 BRBS 81(CRT) (4th Cir. 2017); *accord Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). If the employer satisfies this burden, the presumption falls out of the case, and claimant bears the burden of establishing the work-relatedness of his condition by a preponderance of the evidence. *See id.* In this case, Dr. Leibovic's opinion that claimant's shoulder impingement is unrelated to the work accident is substantial evidence to rebut the Section 20(a) presumption. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Cline v. Huntington Ingalls, Inc.*, 48 BRBS 5 (2013). In the absence of any contrary medical opinion, we affirm the administrative law judge's finding that claimant did not establish by a preponderance of the evidence that he has a work-related shoulder injury. *See generally Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

Claimant next challenges the administrative law judge's finding that his work injury reached maximum medical improvement on December 1, 2015. Claimant contends the administrative law judge erred by not giving weight to Dr. Leibovic's opinion that claimant reached maximum medical improvement on June 2, 2016, when he opined that claimant has a 20 percent impairment of the right upper extremity. CX 3 at 20-21.

The administrative law judge addressed Dr. Leibovic's office notes from December 1, 2015 to June 2, 2016. He quoted Dr. Leibovic's December 1, 2015, office note, which states:

> [Claimant] is resigned to the fact that he probably will need to live with his condition the way it is now, for the rest of his life. I told him I am not quite sure about that, he may note some slow improvement over months or years, but that in general I believe he is close to maximum medical improvement at this time.

Decision and Order at 25 (quoting CX 3 at 17). In evaluating the relevant evidence, the administrative law judge gave weight to Dr. Leibovic's discontinuing physical therapy on December 1, 2015, his anticipating at that time no more than minimal improvement in claimant's right upper extremity, his subsequently noting "nothing much has changed," and his reiterating that claimant would not experience significant improvement, to find that claimant's right arm condition stabilized on December 1, 2015. *Id*. at 26. The administrative law judge determined that claimant's remaining office visits were directed towards refining his right upper extremity medical-vocational restrictions and calculating a permanent impairment rating. Accordingly, the administrative law judge concluded that claimant's right arm injury reached maximum medical improvement on December 1, 2015. *Id*.

A claimant's condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 349 U.S. 976 (1969). Moreover, an employee has reached maximum medical improvement, and thus permanency, when he is no longer undergoing treatment with a view toward improving his condition. *See Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994).

In this case, over two years had elapsed since the September 16, 2013 work injury at the time Dr. Leibovic discontinued physical therapy on December 1, 2015, and opined that little future improvement was anticipated. Based on this evidence, the administrative law judge rationally found that claimant's condition had stabilized by December 1, 2015, as claimant was no longer undergoing treatment to improve his condition. *See Abbott*, 40 F.3d 122, 29 BRBS 22(CRT); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). Accordingly, we affirm the administrative law judge's finding that claimant's right upper extremity reached maximum medical improvement on December 1, 2015, as it is supported by substantial evidence. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Delay*, 31 BRBS 197.

Claimant also challenges the administrative law judge's finding that employer established the availability of suitable alternate employment. Claimant avers that the administrative law judge failed to consider vocational factors, such as his work history, skills, and educational background, and that the jobs listed in employer's two labor market surveys are beyond his vocational experience.

The administrative law judge gave weight to the work-related restrictions imposed by Dr. Leibovic regarding claimant's use of his right thumb, hand, wrist and arm to the effect that it is merely a "helper hand;" he cannot work at jobs requiring right hand

dominant fine and gross manipulation, constant grasping, handling, repetitive pinching, fingering and hand rotation, or constant lifting or carrying of more than 2.5 pounds, with no crawling or more than infrequent kneeling. Decision and Order at 28-29; CXs 3 at 18-20; 9. The administrative law judge stated that Ms. Griffin submitted two labor market surveys listing available positions within a reasonable commuting distance for claimant, from which she later excluded two of the positions. Decision and Order at 29; EXs 8, 9. The administrative law judge determined that an additional eight of the available positions are not within claimant's medical-vocational restrictions, notwithstanding that Dr. Leibovic approved them. *Id*. at 29-30. The administrative law judge found that the remaining 12 positions constitute suitable alternate employment, as they are within claimant's medical-vocational restrictions. *Id*. at 30-31

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Once, as here, claimant establishes that he is unable to perform his usual employment duties due to his work injury, the burden shifts to employer to demonstrate the availability of a range of jobs claimant can perform. *See Marine Repair Services, Inc. v. Fifer*, 717 F.3d 327, 47 BRBS 25(CRT) (4th Cir. 2013); *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). In addressing this issue, the administrative law judge must compare claimant's physical restrictions with the requirements of the positions identified by employer in order to determine whether employer has met its burden. *See Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998).

Employer's labor market surveys explicitly incorporate the work restrictions that were imposed by Dr. Leibovic after the January 19, 2016 functional capacity evaluation and given weight by the administrative law judge. CXs 3 at 18; 9; EXs 8 at 1-2; 9 at 1-2. The surveys listed available positions in the Hampton Roads area, where claimant resides, summarized claimant's work history as a lasher, forklift operator, football coach, security guard, and engineering technician, noted that he has an engineering degree, and identified specific transferrable skills. EXs 8 at 2-3; 9 at 2-3. The listed positions gave, inter alia, the name of the prospective employer, qualifications required, duties and physical demands. EXs 8 at 4-16; 9 at 3-12. Accordingly, we reject claimant's contention that the labor market surveys are deficient and did not consider his vocational factors. Moreover, we affirm the administrative law judge's crediting the positions available as of January 1, 2016, which were identified in the May 31, 2016 labor market survey and approved by Dr. Leibovic. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991) (retroactive surveys permissible). The administrative law judge compared claimant's physical restrictions to the requirements of the jobs and permissibly found that these nine positions are within claimant's physical and vocational

abilities.[1] *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011). Accordingly, we affirm the administrative law judge's finding that employer established the availability of suitable alternate employment.

Finally, claimant challenges the administrative law judge's finding that he did not diligently seek suitable work after December 1, 2015. A claimant may retain eligibility for total disability benefits, after employer establishes the availability of suitable alternate employment, if claimant demonstrates that he diligently, yet unsuccessfully, sought alternate work of the type shown by employer to be suitable and available. *See Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *see also Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991).

The administrative law judge noted claimant's testimony that he told prospective employers he could lift no more than two pounds, but found that claimant did not accurately relate his lifting restrictions as the functional capacity evaluation and Dr. Leibovic assigned restrictions of occasional lifting of no more than 10 pounds, frequent lifting of no more than 5 pounds and constant lifting of no more than 2.5 pounds. Decision and Order at 32; Tr. at 32-33; CXs 3 at 18; 9 at 3; 11 at 26. The administrative law judge noted claimant's testimony that he submitted ten job applications over three months, became frustrated by his lack of success, and believes that he is incapable of working; however, the administrative law judge also noted that claimant, through his counsel, refused to cooperate with Ms. Griffin to complete a vocational assessment and refused her offer to provide vocational rehabilitation services. Decision and Order at 32; Tr. at 33, 41-42; CX 11; EXs 8 at 1, 9 at 1. Regarding claimant's submission of evidence documenting his job search, the administrative law judge gave weight to Ms. Griffin's opinion, after her review of this evidence, that claimant did not properly market himself to prospective employers and misrepresented his lifting restriction to prospective employers. *Id*. The administrative law judge specifically noted Ms. Griffin's assessment that claimant applied for positons outside his work restrictions, requested an unreasonable hourly wage of $40, and provided responses on some applications that would sabotage his being hired,[2] and that she could

[1] Accordingly, we need not address the three additional positions the administrative law judge found suitable, which were not available until October/November 2016. Decision and Order at 31; EX 9.

[2] More specifically, claimant responded to written questions from prospective employers addressing how he would assist customers, "stall until someone helps me," and "nothing." CX 11 at 27.

verify only one application claimant submitted after December 1, 2015, for the positions in his job search materials. *Id*. at 32-33; EX 14 at 1-3. Based on this evidence, the administrative law judge found that claimant failed to establish he engaged in a diligent job search. *Id*. at 33.

The Board may not reweigh the evidence or substitute its views for those of the administrative law judge. *See Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003). Rather, the administrative law judge's inferences and credibility assessments are to be afforded deference *Pittman Mechanical Contractors, Inc.*, 35 F.3d 122, 28 BRBS 89(CRT). In this case, the administrative law judge permissibly credited Ms. Griffin's assessment of claimant's job search, and rationally concluded claimant provided an inaccurate assessment of his work restriction to prospective employers and did not diligently seek suitable work. *Id*. Accordingly, as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant did not establish that he diligently sought suitable work. *Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). Therefore, we affirm the finding that claimant's disability became partial on January 1, 2016. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge